

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Case No. 2:14-cr-00290-KJD-PAL

Plaintiff,

v.

**AMENDED
REPORT OF FINDINGS AND
RECOMMENDATION**

ANOUSONE SAVANH,

(Mot Suppress - Dkt. #84)

Defendant.

This amended report of findings and recommendation is being submitted to correct a typographical error on page 9, line 3. No other changes have been made this document.

Before the court is Defendant's Anousone Savanh's ("Savanh") untimely filed Motion to Suppress Statements (Dkt. #84) which was referred to me for a Report of Findings of Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB1-4. The court has considered the Motion (Dkt. #84), the government's Response (Dkt. #89), and Savanh's Reply (Dkt. #90)

BACKGROUND

Defendant Anousone Savanh ("Savanh") is charged in an Indictment (Dkt. #17) returned August 27, 2014, with receipt or distribution of child pornography in violation of 18 U.S.C. § 2252(a)(2)(B) and possession of child pornography in violation of 18 U.S.C. § 2252(A)(a)(5)(B). He was initially charge in a criminal Complaint (Dkt. #1) filed March 21, 2014. He appeared for his arraignment and plea on September 3, 2014, pled not guilty, and a trial date was set for November 3, 2014, at 9:00 a.m. *See* Minutes of Proceedings (Dkt. #24).

Pursuant to the court's standard order regarding pretrial procedure, motions were due October 3, 2014. *See* Order (Dkt. #21). Thereafter, the parties stipulated (Dkt. #26) to continue the motion deadlines and trial date. The district judge approved the stipulation and continued the trial date and extended the deadline for filing motions until December 2, 2014. *See* Stipulation

1 and Order (Dkt. ##26, 27). The parties stipulated to continue the deadlines several times more.
2 The deadline for filing pretrial motions set by the parties' last stipulation and the court's order
3 expired May 5, 2015. This case is currently set for trial April 18, 2016.

4 The motion to suppress acknowledges that the motion was not timely filed. It argues that
5 statements Mr. Savanh made to Detective Nichols on March 19, 2014, were not voluntary and
6 were obtained in violation of *Miranda*. The motion requests an evidentiary hearing. It is
7 supported by manually filing audio recordings of the interrogations at issue as Exhibits A and B,
8 and a transcript of the interrogations submitted as Exhibit C.

9 Savanh argues that under the totality of the circumstances, he was subjected to coercive
10 police activity and psychological pressure which rendered his statements involuntary.
11 Specifically, he argues that numerous state and federal police officers were present at his house
12 to execute a search warrant in the early afternoon hours of March 19, 2014. Six officers rushed
13 into his home with their guns aimed at him and told him to come out with his hands up. Savanh
14 was moved outside in his underwear to a police car down the street. Eventually, he was moved
15 into the living room of his home, handcuffs were removed, and he was allowed to dress.
16 However, he was not permitted to leave the living room or call his wife. He was subsequently
17 ordered back out to the police car by Detective Wayne Nichols where he was questioned a
18 second time.

19 In the first interrogation, Detective Nichols read Savanh his *Miranda* rights and advised
20 Savanh he was investigating illegal downloads over the internet. Savanh was asked a number of
21 questions and initially told Detective Nichols was investigating child pornography. Detective
22 Nichols asked Savanh to rule himself out as the person downloading pornography, or tell
23 Detective Nichols who was responsible, and that his adult son and wife would be questioned
24 about the child pornography on the computer. Savanh initially denied that he had downloaded
25 any child pornography, but after confronted with evidence that child pornography had been
26 found on his computer, he made incriminating admissions.

27 Under the totality of the circumstances, Savanh alleges his will was overborne because a
28 number of armed police officers and federal agents controlled his every move while he remained

1 in custody for several hours, he was isolated from his family members, and he was prevented
2 from speaking with his wife. Additionally, Detective Nichols' statements to him caused him to
3 fear his adult son would go to jail if he refused to cooperate.

4 Savanh also argues that his personal characteristics made him more susceptible to the
5 coercive tactics that were employed by Detective Nichols. Specifically, Mr. Savanh escaped
6 violence in Laos and lost his father at a young age. He and his mother escaped to seek refuge in
7 the United States, but his father was killed by military forces during the Laotian civil war. Mr.
8 Savanh is deferential to authority. Detective Nichols told Savanh he was not being honest and
9 that his answers did not make sense, and Savanh was pushed until Detective Nichols got the
10 answers he wanted. Detective Nichols repeatedly asked Savanh the age group of children he was
11 interested in. Savanh initially denied that he had an age preference, but finally gave an answer.
12 Savanh told Detective Nichols that his "brain has been troubled" and that he had been sexually
13 abused as a child. Under all of these circumstances, Savanh claims his will was overborne by the
14 police, and his confession was therefore not voluntary.

15 Savanh also argues that although he received and waived *Miranda* warnings during the
16 first interrogation, he should have been re-Mirandized because his circumstances had changed
17 between the two interrogations requiring re-advisement of rights. Detective Nichols advised
18 Savanh that in excess of a thousand images of child pornography had been found on his
19 computer which indicated to Savanh that someone was now going to jail. Savanh told Detective
20 Nichols that he had been vague about his son earlier because he did not want both of them to go
21 to jail. During the second interrogation, Savanh saw his wife through the window of Detective
22 Nichols' car and pointed her out. Savanh's wife was not permitted to enter the home or approach
23 the car where Mr. Savanh was being interrogated which sent a clear signal to Savanh that his
24 rights had changed and he was now going to jail no matter what he said. The court must decide
25 whether a reasonable person in Mr. Savanh's position would have felt deprived of his freedom of
26 action in any significant way, such that he would not have felt free to terminate the interrogation.

27 Savanh also argues that in the context of interrogations outside of the police station, the
28 Ninth Circuit identifies the factors articulated in *United States v. Craighead*, 539 F.3d 1073,

1 1084 (9th Cir. 2008) in evaluating whether the circumstances of an interrogation constituted a
2 police dominated atmosphere such that a person is in custody for purposes of *Miranda*. Here at
3 least thirteen armed police officers and federal agents were present at his home on the date the
4 search warrant was executed. Second, the officers immediately cuffed him while he was in his
5 underwear and controlled his physical movements for hours. Third, Savanh was isolated from
6 his family members as they tried to approach the home and police car. Fourth, Savanh was not
7 informed he was free to leave or terminate the interrogation. Rather, at the start of the second
8 interrogation, Detective Nichols made a perfunctory statement to the effect that “You still
9 understand your *Miranda* rights. You understand you don’t have to speak to me, correct, sir?”
10 This was insufficient. Savanh was never told he was free to leave the interrogation and could not
11 have reasonably believed he was free to leave. Therefore, statements made during the second
12 interrogation should be suppressed under *Miranda* because the interrogation violated his Fifth
13 Amendment protections.

14 The government opposes the motion arguing the court should deny it as untimely.
15 However, on the merits, the government argues that the audio recordings of Detective Nichols’
16 interview with Savanh are the best evidence of the conversation that transpired between the two
17 men. Savanh received and waived *Miranda* warnings signing a written waiver. The government
18 also disputes that Savanh was under arrest, that his movements were controlled at all times, and
19 that he was isolated from family members. The tape-recorded interviews with Detective Nichols
20 indicate that Savanh kept his phone and answered cell phone calls with family members. Both
21 interviews lasted less than one hour.

22 The government’s motion is supported by an attached incident report prepared by
23 Detective Nichols, the written waiver of *Miranda* rights Savanh signed, and photographs
24 showing the condition of the interior of Savanh’s residence before it was searched, as well as
25 photographs of Detective Nichols’ unmarked minivan where the questioning occurred.

26 Savanh’s reply argues that the government’s opposition establishes factual disputes
27 which should be addressed at an evidentiary hearing.

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DISCUSSION

The government has the burden of proving, by a preponderance of the evidence, whether a confession is voluntary. *See Lego v. Twomey*, 404 U.S. 477, 489 (1972). The government must also establish, by a preponderance of the evidence, that a defendant waived his protection against self-incrimination under *Miranda*. *Colorado v. Connelly*, 479 U.S. 157, 158 (1986).

I. The Requirement for *Miranda* Warnings.

Miranda warnings are necessary when a suspect in custody is interrogated by police. *See Thompson v. Keohane*, 516 U.S. 99, 102 (1995). In *Rhode Island v. Innis*, 446 U.S. 291 (1980), the Supreme Court defined interrogation as “express questioning or its functional equivalent.” 446 U.S. at 300-01. The Supreme Court and courts of appeal have repeatedly emphasized that many types of questions are not considered interrogation and do not require *Miranda* warnings. For example, questions asked of a motorist temporarily detained in a traffic stop do not require *Miranda* warnings. *See Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). Asking a suspect questions regarding general biographical information is not interrogation. *United States v. Foster*, 227 F.3d 1096, 1103 (9th Cir. 2000).

A valid waiver of *Miranda* rights depends upon the “totality of the circumstances including the background, experience, and conduct of defendant.” *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. Cal. 1009) (citing *United States v. Bernard S.*, 795 F.2d 749, 751 (9th Cir. 1986)).

There is a distinction between a claim that a *Miranda* waiver is not voluntary and a claim that a *Miranda* waiver was not knowing and intelligent. The voluntariness of a waiver has always depended on the absence of police overreaching. *See Connelly*, 479 U.S. at 170. Although courts often merge the two-pronged analysis, the components should not be conflated. *See Cox v. Del Papa*, 542 F.3d 669, 675 (9th Cir. 2008). First, a valid *Miranda* waiver requires a showing that it was voluntary and the product of a free and deliberate choice rather than the product of intimidation, coercion, or deception. Second, a valid *Miranda* waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *See United States v. Frank*, 956 F.2d 872, 877 (9th Cir.1992).

1 Only if the “totality of the circumstances surrounding the interrogation” reveals both an
 2 uncoerced choice and the requisite level of comprehension may a court conclude that *Miranda*
 3 rights have been waived. *Id.* at 877.

4 **II. Voluntariness.**

5 A statement is voluntary where it is “the product of a rational intellect and free will.”
 6 *See United States v. Kelley*, 953 F.2d 562, 564 (9th Cir. 1992) (citing *Blackburn v.*
 7 *Alabama*, 361 U.S. 199, 208 (1960)). In examining the voluntariness of a confession, the
 8 court must consider “whether, under the totality of the circumstances, the challenged
 9 confession was obtained in a manner compatible with the requirements of the Constitution.”
 10 *See Derrick*, 924 F.2d at 817. In addition, the Supreme Court has determined that coercive
 11 police activity is a necessary predicate to a finding that a confession is not voluntary.
 12 *See Connelly*, 479 U.S. at 167. It is the government’s burden to prove that a confession was
 13 voluntary by a preponderance of the evidence. *See United States v. Jenkins*, 958 F.2d 934, 937
 14 (9th Cir. 1991) (citing *Lego v. Twomey*, 404 U.S. 477, 489 (1972)); *Connelly*, 479 U.S. at 168.

15 To determine whether a confession is voluntary, the court applies a totality of the
 16 circumstances test. *See United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988).
 17 The court determines whether, “considering the totality of the circumstances, the government
 18 obtained the statement by physical or psychological coercion, or by improper inducement so
 19 that the suspect’s will was overborne.” *Id.* In assessing the voluntariness of a confession, the
 20 court considers “the totality of all the surrounding circumstances—both the characteristics of
 21 the accused and the details of the interrogation.” *Gifferson v. United States*, 530 U.S. 428, 434
 22 (2000).

23 District courts are required make a pretrial determination of the voluntariness of
 24 confessions. *See* 18 U.S.C. § 3501. However, a defendant must file a motion to suppress an
 25 involuntary confession before the pretrial motion deadline. Fed. R. Crim. P. 12(b)(3)(C), (c)(1).
 26 If a defendant does not file his suppression motion before this deadline, “the motion is untimely”
 27 and the defendant waives his objection to admission. Fed. R. Crim. P. 12(c)(3). *See also United*
 28 *States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984) (citing *United States v. Maher*, 645 F.2d

1 780, 783 & n.1 (9th Cir. 1981) (applying Rule 12 to an untimely motion under 18 U.S.C.
2 § 3501). A court may consider the request “if the party shows good cause.” Fed. R. Crim. P.
3 12(c)(3). “The decision whether to grant an exception to a Rule 12 waiver lies in the discretion
4 of the district court.” *United States v. Tekle*, 329 F.3d 1108, 1113 (9th Cir. 2003) (citing
5 *Gonzales*, 749 F.2d at 1336). *See also United States v. Kessee*, 992 F.2d 1001, 1002 (9th Cir.
6 1993). A belated decision to change trial tactics does not constitute good cause to excuse the
7 waiver. *Gonzales*, 749 F.2d at 1336.

8 **III. Analysis and Decision.**

9 This motion was not timely filed. It was filed more than nine months after the last
10 extension granted for filing pretrial motions. There was no request to extend the deadline to file
11 this motion. There is no explanation for why the motion was not timely filed let alone a showing
12 of good cause.

13 It is undisputed that Savanh received and waived *Miranda* warnings. An audio recording
14 of the interrogation reflects the exact rights that were read to Savanh from a standard admonition
15 of rights card. Savanh signed a written acknowledgement and waiver of his *Miranda* rights.
16 Savanh’s motion to suppress and reply make bald, unsupported assertions that he was subjected
17 to coercive police activity. The motion is not supported by an affidavit or offer of proof. The
18 government concedes that the officers breached the door and entered the residence with guns
19 drawn pursuant to standard police policy in executing a search warrant. The transcript and tape
20 recording of Savanh’s interviews with Detective Nichols confirm that the officers knocked on
21 the door and rang the doorbell. No one answered and the officers therefore forcibly entered the
22 premises. The government concedes that Savanh was initially handcuffed until the premises was
23 cleared and officers determined that no one else was present. Savanh does not claim that he was
24 handcuffed while being interviewed by Detective Nichols in the minivan parked outside.

25 The first tape recorded interview lasted approximately twenty-eight minutes between
26 2:00 p.m. and 2:28 p.m. Detective Nichols advised Savanh that he was there to investigate
27 illegal downloads. He did not initially tell Savanh that the initial downloads involved child
28 pornography. Savanh answered preliminary background questions about who lived in the

1 residence, how many computers the residence had, and where they were located. Detective
2 Nichols eventually indicated that he was not investigating downloading movies or songs, but
3 child pornography. He told Savanh that he was there to investigate whether Savanh was
4 involved in the investigation so that he could eliminate one person at a time. At no point during
5 the initial interview did Nichols tell Savanh that he, his wife, or adult son would go to jail.
6 Rather, Detective Nichols told Savanh that he would talk with his wife and adult son about the
7 investigation when they got home.

8 Savanh's motion to suppress claims that Detective Nichols was somehow exploiting the
9 parent/child relationship. The audio and transcribed interviews belie this suggestion. To the
10 contrary, Detective Nichols repeatedly told Savanh that he was investigating who was
11 responsible for the child pornography the police believed was on a computer in the residence. It
12 was Savanh who evaded direct questions during the first interview about whether Savanh himself
13 was the one downloading child pornography. Savanh was asked about others, including his adult
14 son, who might have access to computers inside the residence. Savanh stated that he did not
15 know what might be on the computer of his adult son.

16 Additionally, Savanh's motion suggests that Savanh was somehow isolated from his
17 family. The tape recorded interviews, however, do not support this claim. The motion is not
18 supported by an affidavit or offer of proof to the contrary. It is undisputed that Savanh was the
19 only one home at the time officers initially executed the search warrant. During the first
20 interview, Savanh had a cell phone and answered the phone twice. While he was in Detective
21 Nichols' vehicle, he pointed out that his wife had arrived. He did not ask to speak with his wife
22 and nothing in the record suggests that Savanh's wife attempted to speak with him. Rather, the
23 transcript of the interview clearly indicates that Detective Nichols told Savanh that his wife
24 would be allowed to enter the residence. The adult son was picking up Savanh's two younger
25 children from school. Detective Nichols told Savanh that when his adult son arrived with his
26 two other sons Savanh would be allowed to speak with them and could tell them what he wanted
27 to about the officers' presence.

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1 During the first interview Savanh was told that the police were looking for evidence
2 authorized by the search warrant and that he would be returned to the house and allowed access
3 to his own home, although he would not be allowed to interfere with the search. Savanh
4 acknowledges that he re-entered the house.

5 The first tape recorded interview with Detective Nichols lasted approximately twenty-
6 eight minutes. The second interview began at 2:50 p.m. and ended at 3:25 p.m. At the
7 beginning of the second interview, Detective Nichols stated that both had consensually ended the
8 first interview to go into the house and were now back on the record. Nichols related that while
9 back in the house, Nichols pulled Savanh into the bedroom where a computer was being
10 examined and that Nichols asked if the computer was his or in his bedroom, and that Savanh said
11 yes. Nichols then stated, "I want to make sure that you know that we're going back on the
12 record. You still understand your *Miranda* rights. You understand you don't have to speak with
13 me, correct sir?" Savanh responded, "Yes sir. I understand." Detective Nichols followed up
14 with "and am I good to kind of get some follow up questions?" Savanh responded, "Yes."

15 It was during the second interview that Savanh eventually made incriminating statements
16 that he had downloaded pornography, including child pornography, and that he had been doing
17 so for more than five years. He was asked questions about how he accessed the child
18 pornography, and explained that he used Google, Yahoo! and AOL and typed in words to initiate
19 the search like "teen pics" and "pre-teen pics". He initially told Detective Nichols he
20 accidentally downloaded child pornography. However, after further questioning, he admitted
21 that he downloaded a large amount of pornography and described how he typed in the terms
22 "teen pics" or "teen gallery" which brought up the search which brought him to a website that
23 had subcategories. He repeatedly indicated that he looked at the pornography, but then deleted it
24 because he did not want his wife or children seeing the material.

25 At one point during the second interview, Detective Nichols suggested that they take a
26 break because it appeared Savanh was becoming worked up, and becoming very agitated. This
27 was after Detective Nichols asked whether Savanh had a sexual attraction that he was struggling
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1 with. Savanh responded that he had never ever touched anyone's kids. Detective Nichols
2 responded "I didn't say you did." The following exchange occurred:

3 Question: I didn't say you did, Mike. You need—you need to—let's go ahead and
4 take a break, here—

5 Answer: Sorry.

6 Question: --because you're getting way worked up, here—

7 Answer: Sorry.

8 Question: --and you're coming off as very agitated.

9 Answer: Well, no, I'm agitated at myself. I'm not agitated at you. I'm—I'm mad
10 at myself for, you know, even doing it in the first place.

11 Transcript. Exhibit C. p. 39.

12 Savanh went on to tell Nichols that he was not upset with Nichols. It was shortly after
13 this that Savanh pointed out that his wife had arrived and stated "I don't know if she knows."
14 Nichols told Savanh that his wife could go into the house.

15 At one point, after Savanh admitted to Detective Nichols that he had been downloading
16 child pornography for over five years, Nichols asked whether he had been accidentally doing this
17 for five years. Savanh responded, "No, no, no." *Id.* at p. 41. Nichols asked whether viewing the
18 material gave him some type of gratification and Savanh denied it. *Id.* at 42. Detective Nichols
19 began to ask whether Savanh had some type of history and noted that "—you're laughing Mike.
20 I don't understand." Savanh responded, "'Cause I don't understand neither. That's why I'm
21 laughing." *Id.* at 42. Nichols told Savanh he was not judging him and Savanh responded, "I
22 appreciate that and—and even if you were I—I'm guilty of it. There's not much I can do about
23 it." *Id.* at 43. He went on to explain that it was a struggle "because I was sexually assaulted as a
24 kid." *Id.*

25 A few minutes later, Savanh told Nichols that he did not want to lie to Nichols about
26 whether there was anything on his son's computer, because "I don't know what he does. If he's
27 downloading stuff, too, I don't—I didn't want to say I'm the only one." *Id.* at 44. Nichols then
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1 told Savanh that officers did not locate any content on his son's computer and Savanh thanked
2 him. *Id.*

3 Savanh went on to explain that he deleted everything after he reviewed it and claimed
4 that he did not realize that the images were kept in his recycle bin. He reiterated that he did not
5 want his wife and kids to see that he was downloading it. After a number of additional
6 questions, Nichols told Savanh he appreciated Savanh being honest. Savanh responded, "No
7 problem." *Id.* at 57. A few questions later, after asking about child pornography involving
8 babies, Detective Nichols apologized to Savanh if he had been offended. Savanh responded,
9 "No, I apologize. Ok?" *Id.* at 58. It was at this point that Nichols asked Savanh whether he had
10 a preference for an age group. Savanh denied he had a preference, but ultimately said, "12-year-
11 olds and up." *Id.* at 60. Savanh expressed that he felt guilty about downloading child
12 pornography:

13 Yeah. I don't like—I don't like it. It's a—it's a guilt thing, you know? And you
14 basically know it's wrong and you wish you don't have to do it. You wish you
15 didn't have to do it but, you know, that's the way it goes. And you know what?
16 And—and to tell you the truth, Wayne, I—I, you know, I already—I already
17 knew, you know, that you guys were on to me. I already knew you guys were
18 going to come. It's just a matter of time. And like I said, I—I...

19 *Id.* at 62.

20 Detective Nichols promised Savanh that he would be treated professionally and Savanh
21 responded, "You are." *Id.* at 64. Detective Nichols then told Savanh what to expect, that the
22 police would take the evidence and analyze it and make a decision about prosecution. Nichols
23 expressly told Savanh that the case would be prosecuted. Savanh responded, "I understand." *Id.*
24 at 67. Detective Nichols then told Savanh that if Savanh would guarantee that he would remain
25 in contact, Nichols would call Savanh on the phone to make arrangements for him to surrender
26 himself instead of arresting him at work or in front of his family. *Id.* at 68. The interview ended
27 with Detective Nichols asking Savanh if he had any more questions. The only questions Savanh
28 had were about making arrangements to have his front door fixed. There was an extensive
exchange about the fact that the officers had broken the door. Detective Nichols gave Savanh

1 the number for risk management. Savanh repeatedly asked whether the police would fix the door
2 or make arrangements to have the door fixed. During the exchange, Detective Nichols said that
3 he did not know whether risk management would do it, because this was not a situation in which
4 the police had kicked in the wrong door. Savanh responded, "I'm not saying that." Savanh
5 persisted in asking whether risk management would give him a number for somebody to repair
6 the door really quick. Nichols responded that risk management would probably tell him to look
7 for someone in the white pages to find a carpenter to get it fixed. Savanh responded, "I thought
8 you had something like, you know, like tomorrow. You guys do this every day, don't you?" *Id.*
9 at 70. Nichols responded that police serve search warrants every day, but didn't fix doors. *Id.*
10 The discussion continued for another two pages of transcription. In short, the transcript and
11 audio recording simply do not support Savanh's arguments that he was subjected to a coercive
12 police environment that overbore his will.

13 Having reviewed and considered the moving and responsive papers and supporting
14 exhibits,

15 **IT IS RECOMMENDED** that the Motion to Suppress Statements be **DENIED** as
16 untimely. However, as the government has the burden of proving by a preponderance of the
17 evidence whether a confession was voluntary before it is introduced, **IT IS RECOMMENDED**
18 that the government be required to lay a foundation at trial before the incriminating statements
19 are admitted.

20 DATED this 1st day of April, 2016.

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22 
23 PEGGY A. GREEN
24 UNITED STATES MAGISTRATE JUDGE
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